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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 451

EUGENE A. BOND,
Petitioner,

v.

THE TWIN LAKES RESERVOIR AND CANAL COMPANY, THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, AND THE COLORADO NATIONAL BANK OF DENVER
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Colorado

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INDEX

PAGE

I. OPINION BELOW 2

II. QUESTIONS PRESENTED 2

A to C, inclusive 2

III. ARGUMENT 3

A. JURISDICTION 3

B. CONSTITUTIONAL QUESTIONS INVOLVED 5

C. PARTITION 6

IV. CONCLUSION 6

CITATIONS

1. Twin Lakes R. & C. Co. vs. Bond, 401 Pac.2nd 586, 155 Colo. ..... Not reported 2

2. Hardin vs. Jordan (1891) 140 U.S. 371, 35 L.Ed. 423, 11 S.Ct. 808 2,3

3. Kaukauna Co. v. Green Bay & c. Canal (1891) 142 U.S. 254, 35 L.Ed. 1004, 12 S.Ct. 173 3

4. Shively v. Bowlby (1893) 152 U.S. 1, 38 L.Ed. 331, 14 S.Ct. 548 3

INDEX (CONTINUED)

PAGE

5. Eldridge v. Trezevant
(1895) 160 U.S. 452, 40 L.Ed. 490,
16 S.Ct. 345 3

6. Smith v. Town of Fowler
138 Colo. 359, 333 P.2d 1034 4

7. Producers Oil Co. v. Hanzen
(1915) 238 U.S. 325, 59 L.Ed. 1330,
35 S.Ct. 755 5

8. United States v. Elliot
(10th Cir. 1921) 131 F.2d 720 5

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The Twin Lakes Reservoir and Canal Company, The Connecticut Mutual Life Insurance Company, and The Colorado National Bank of Denver, as respondents herein, respectfully submit the following brief in opposition to the Petitioner's Petition for Writ of Certiorari directed to the Supreme Court of the State of Colorado:

I. OPINION BELOW

The official report of the opinion delivered by the Supreme Court of the State of Colorado in this matter has been copied verbatim in the petitioner's brief and is reported in 155 Colo. ....., Colorado Advance Sheets for April 5, 1965, Vol. 17, No. 12, Pg. 210; 401 P.2d 586.

II. QUESTIONS PRESENTED

A. The petitioner in his brief claims that the Supreme Court of the United States has jurisdiction in this matter by virtue of the fact that the Supreme Court of the State of Colorado failed to follow the decision of the case of *Hardin v. Jordan* (1891) 140 U.S. 371, 35 L.Ed. 423, 11 S.Ct. 808

B. The second argument presented by the petitioner is that this case involves the due process of law provisions of the Fifth Amendment to the Constitution of the United States and Section 1 of the Fourteenth Amendment to the Constitution of the United States.

C. The third argument submitted by the petitioner herein is that the State of Colorado does not have the power to grant or deny partition between equal co-tenants on property within the territorial limits of the State of Colorado.

III. ARGUMENT

A. JURISDICTION

It is the contention of the respondents herein that none of the issues as stated by the petitioner set forth an issue which would invoke the jurisdiction of the United States Supreme Court.

The main contention of the petitioner herein in his argument is that the Supreme Court of the State of Colorado failed to follow the decision of *Hardin v. Jordan* (1891) 140 U.S. 371, 35 L.Ed. 423, 11 S.Ct. 808. In that case the Supreme Court of the United States held:

> "3. Grants of the government for lands bounded on streams and other waters, without any reservation or restriction of terms, are to be construed as to their effect according to the law of the State in which the lands lie."

Following the decision in *Hardin v. Jordan,* it has been well settled by this Court that questions relating to construction of grants for lands bounded by streams or other waters are to be determined by the law of the state in which the land is located. *Kaukauna Co. v. Green Bay & c.Canal* (1891) 142 U.S. 254, 35 L.Ed. 1004, 12 S.Ct. 173; *Shively v. Bowlby* (1893) 152 U.S. 1, 38 L.Ed. 331, 14 S.Ct. 548; *Eldridge v. Trezevant,* (1895) 160 U.S. 452, 40 L.Ed. 490, 16 S.Ct. 345.

It is the contention of the respondents herein that the Supreme Court of the State of Colorado did exactly what the decision in *Hardin v. Jordan* depicted; that this is a matter which the State should determine and they did so

determine in accordance with Colorado law by their decision in the instant case. Justice Moore of the Colorado Supreme Court in his decision determined that under the evidence in this particular case that for a period of over sixty years the predecessors in title to the petitioner herein had construed and utilized the meander line, as indicated by the official government survey as the boundary line. This conclusion of the Colorado Supreme Court was premised on established Colorado law as set forth in *Smith v. Town of Fowler*, 138 Colo. 359, 333 P.2d 1034, and supported by evidence depicting the following:

1) "The government survey meandered two lakes and platted fractional lots on all sides of those lakes and in between the lakes."

2) "Each lot shown on the survey designates and discloses the acreage contained therein."

3) "The patents to the lands bordering on and all the way around and between both of the Twin Lakes refer to the land and convey the same by lot numbers according to the official survey, and in every case the lot as numbered on the survey discloses the acreage of each lot."

4) "The difference between the acreage as shown on the lots and the acreages claimed by Bond are very material."

5) "The increase in acreage, if ownership is carried to the center of the lake or to the 'thread of the stream,' is so great as to negate the claim."

6) "For over sixty years no grantee in any patent or any successor in interest claimed interest or ownership in any portion of the land under the water of Twin Lakes."

Petitioner, in his argument, does not really dispute that the Colorado Supreme Court failed to follow State law. He merely wishes that the Supreme Court would have come to a different decision than it did.

The Supreme Court of the United States and the federal circuit courts have long acknowledged the rule that under a given factual situation the meander line is in fact the boundary line. *Producers Oil Co. v. Hanzen* (1915) 238 U.S. 325, 59 L.Ed. 1330, 35 S.Ct. 755; *United States v. Elliot,* (10th Cir. 1921) 131 F.2d 720.

It would be difficut indeed, if not impossible, to reconcile the petitioner's argument that the Colorado Supreme Court would jeopardize and confuse all of the United States patents heretofore issued in consideration of the cases cited. The absurdity of this argument is in itself sufficient answer by the respondents.

B. CONSTITUTIONAL QUESTIONS INVOLVED

The petitioner claims that this case involves the due process of law provisions of the Fifth Amendment to the Constitution of the United States and Section 1 of the Fourteenth Amendment to the Constitution of the United States relating to the deprivation and taking the private property without due process of law. He neglects to make any argument in connection therewith or to cite any authorities to support his particular position. It is hard to conceive why the petitioner, who is also an attorney, and who felt he had not been allowed due process of law, would not state forth the specific objections and support them by competent evidence and argument. Both are lacking in this particular petition. We, therefore, submit that

this particular contention is completely without merit and certainly does not involve a situation that would justify the Supreme Court of the United States granting certiorari.

C. PARTITION

The third point the petitioner claims is significant to cause this Court to grant his Writ of Certiorari is the failure of the Supreme Court of Colorado to grant partition in this particular case. We can think of no situation that would be further from a federal issue than the question between equal co-tenants as to whether or not partition will lie under the facts of a particular instance, and particularly where there is a statute controlling that particular conduct. In the instant case the petitioner herein filed suit against the Twin Lakes Reservoir and Canal Company as co-tenant, seeking partition of certain properties located in Lake County, Colorado. The action was commenced pursuant to State statute governing the same and the decision of the Supreme Court of Colorado is in relation thereto and in conformance with the decisions of that Supreme Court in other matters concerning partition that have previously been before it.

IV. CONCLUSION

The respondents herewith respectfully submit that in accordance with the Rules of the Supreme Court of the United States, review of a Writ of Certiorari is not a matter of right but a matter of sound judicial discretion of this Court and should be granted only when there are special or important reasons therefor. It is submitted by the respondents that the decision of the Supreme Court

of the State of Colorado in no way has decided a federal question of substance not heretofore determined nor has decided it in a way contrary with the applicable decisions of the State, nor does it deprive the petitioner herein of any of the protections or rights guaranteed to him by the Constitution of the United States, the laws of the United States, or the decisions of the Supreme Court of the United States. For these reasons and the reasons and authorities cited herein, the respondents request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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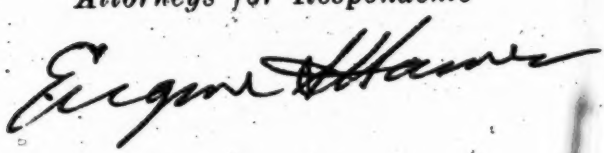

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REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INDEX

No.		Page
I.	QUESTIONS PRESENTED	1
II.	HARDIN vs. JORDAN	3
III.	FIFTH AND FOURTEENTH AMENDMENTS	4
IV.	PARTITION	4
V.	RESPONDENTS' CITATIONS	5
VI.	CONCLUSION	6

CITATIONS

No.		Page
1.	Hardin vs. Jordon, (1891) 140 U.S. 371, 35 L. Ed. 423, 11 S. Ct. 808.	1, 3, 4, 5
2.	Kaukauna Water Power Co. vs. Green Bay Company, (1891) 142 U.S. 254, 35 L. Ed. 1004, 12 S. Ct. 173.	5
3.	Smith vs. Town of Fowler, (1959) 138 Colo. 359, 333 P. (2d) 1034.	5
4.	Trustees of Schools vs. Schroll, 120 Ill. 509, 9 West Rep. 741.	4

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Eugene A. Bond, petitioner, respectfully submits this Reply to the Brief in Opposition to his Petition for Writ of Certiorari.

I.

Questions Presented

Respondents have limited their argument to the following subjects:

1. Hardin vs. Jordan.

2. The Fifth and Fourteenth Amendments to the Constitution.

3. Partition.

They have avoided all other questions. No reference was made to our third item, designated 3. (c) (iii) on page 3 of our Petition. Among such other questions and included in the mentioned item (iii) is:

> Does the Colorado Supreme Court opinion become res judicata, as between the co-tenants on the question of ownership of the beds of the lakes in the absence of the United States as a party, and the like absence of the State of Colorado at the time the beds of the lake question was first presented?

We think not.

If partition did not lie at the time of the commencement of the suit and does not lie until the expiration of the lease, as the opinion expressly held, then, it was unnecessary and presumptious for that Court to concern itself with the ownership of the beds of the lakes in that opinion. That Court should have either dismissed the partition suit, or reversed the judgment of the lower court for that reason, alone, instead of going on an unnecessary excursion and expedition to the bottom of the lakes. We think this court should NOW declare that part of that opinion NOT to be res judicata, as well as reverse that particular part of the Colorado opinion on the beds of the lakes.

The petitioner, being unclear and in serious doubt about the effect of such opinion, deemed it necessary to present this matter to this Court in this proceeding for fear respondents would later urge, in an imminent condemnation suit by the United States, that the ownership of the beds of the lakes is res judicata as between the two co-tenants by reason of the opinion of the Colorado Supreme Court in

this case. For that reason, our Petition for Certiorari became more impelling.

II.

Hardin vs. Jordan

We think that the above case was fully covered in the Petition and that the respondents' brief added nothing thereto.

It must be remembered that Hardin vs. Jordan had been recognized as law in Colorado in several Colorado Supreme Court cases and, as such was the law of this state at the time the patents and grants were issued. Title to these lake beds was vested by these patents and grants under Acts of Congress. The later right of way, claimed by Twin Lakes Company, was expressly made "subject to all valid existing rights", meaning the patents here involved. The highest court of this state may not change the facts or the law with reference to vested rights under the guise of a self-made and non-existent exception to the Hardin-Jordan Rule and in the face of and against the express findings of the trial court made upon evidence before it. The trial court in this case made findings on the *only* exceptions to the Hardin-Jordan Rule recognized by this court. Those exceptions are (1) a reservation of rights or title in the United States or the State of Colorado in the patent itself, or in the deed of the grantor, and/or (2) an intention to use the original meander line as a boundary line expressed or implied in the patent or grant. See Final Judgment quoted as Item 9 at the top of page 11 of our Petition. The findings apply to all later conveyances of the co-tenancy property. See quoted items of the same Final Judgment in our Petition.

The so-called exceptions relied upon by the Colorado Supreme Court did not exist as a matter of fact, until they were created by the strong arm and multitude of judges in the mentioned opinion. The law of Colorado was and is the common law of England as applied to lake beds and it